

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : **29.11.2018**

SINGLE BENCH : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

W.P. (C) No. 51 of 2018

Petitioners : M/s Pan India Network Limited and Anr.

versus

Respondents : The State of Sikkim & Anr.

**An application under Article 226
of the Constitution of India**

Appearance:

Mr. Zangpo Sherpa, Mr. Passang T. Bhutia and Mr. Sushant Subba, Advocates.

Mr. J.B. Pradhan, Additional Advocate General with Mr. Karma Thinlay, Senior Government Advocate, Mr. Thinlay Dorjee Bhutia, Government Advocate, Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Government Advocates.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Petitioners are before this Court praying that the letter dated 27.10.2018 issued by the Respondent No. 2 as well as the invitation for Expression of Interest/Tender dated

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

29.10.2018 be set aside and the Respondents be directed to abide by the correspondence dated 12.10.2017 and the letter dated 24.09.2018 with the revised revenue. The Petitioners, in terms thereof, be permitted to continue as Marketing Agents for the Sikkim State Online Lotteries for 3 (three) years or till notification of the amended Lottery Rules by the Ministry of Home Affairs, Government of India (*'MHA, GOI'* for short hereinafter respectively) whichever is earlier.

2. Learned Counsel for the Petitioners requested for urgent hearing of the matter in view of the date of opening of Invitation for Expression of Interest/Tender (Annexure-3) for marketing and sale of 5 (five) Online Weekly Lotteries per day (Part A) being 30.11.2018 for Technical Bid and 05.12.2018 for the Financial Bid. Thus, the instant matter was taken up for hearing on 28.11.2018 along with I.A. No. 01 of 2018 which is an application seeking stay of the impugned letter dated 27.10.2018 and the invitation for Expression of Interest/Tender issued by the Respondent No. 2 dated 29.10.2018.

3. The Petitioners being Marketing Agents for 8 (eight) Online Lotteries of the State Respondents vide the extension letter of the Respondent No. 2 dated 12.10.2017 are aggrieved by the invitation for Expression of Interest/Tender (Part A) floated by the Respondent No. 2, on 29.10.2018. The Petitioners contend that subsequent to the correspondence of

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

the Respondent No. 2 dated 12.10.2017 another correspondence was issued on 24.09.2018 vide which the Respondent No. 2 offered continuation of distributorship of 5 (five) out of the 8 (eight) Online Lotteries per day allotted to them, for another period of 3 (three) years or till notification of the amended Lottery Rules by the MHA, GOI. The Petitioners vide their letter dated 05.10.2018 accepted the offer of the Respondent No. 2. Following this correspondence, a letter dated 27.10.2018 was issued by the Respondent No. 2 stating that the State Government had approved for continuation of distributorship of the Petitioners for 8 (eight) (*sic*) weekly Online Lotteries per day at the revised draw rate of Rs.52,000/- (Rupees fifty two thousand) only, and draw expenses of Rs.3,000/- (Rupees three thousand) only, per draw, as interim arrangement till such time a new Marketing Agent was finalized. That, in the event of the Petitioners accepting the terms set out in the letter dated 27.10.2018 they were to send a confirmation letter to the Respondent No. 2. On 30.10.2018 the Petitioners apprehending discontinuation of their agency confirmed acceptance of the terms and conditions laid out in the letter *supra* dated 27.10.2018. Meanwhile on 29.10.2018, invitation for Expression of Interest/Tender (Part A) for marketing and sale of 5 (five) Online Weekly Lotteries per day was floated by Respondent No. 2. Vide letter dated 02.11.2018 the Respondent No. 2 confirmed the acceptance of the Petitioners as the Marketing

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

Agent as agreed in the Petitioners' letter dated 30.10.2018, till the appointment of a new Marketing Agent was finalized. On 12.11.2018, the Petitioners made a representation to the Respondents submitting that they were aggrieved by the issuance of Tender as the Respondent No. 2 had already extended their distributorship for 5 (five) Online Lotteries. The Petitioners also requested the Respondent No. 2 to consider their request for extension at the revised revenue or till notification of the amended Lottery Rules. As there was no response to this correspondence the Petitioners are before this Court with the prayers as aforesaid.

4. The Respondents No. 1 and 2 appeared on advance notice and waived formal notice.

5. Learned Counsel for the Petitioners would urge in the first instance that there was no revocation of the communication dated 12.10.2017 and the offer letter dated 24.09.2018 or termination of the agreement entered into between the Petitioners and the Respondent No. 2. In such a circumstance, the Respondents ought not to have floated the impugned invitation for Expression of Interest dated 29.10.2018 for bids of Online Lotteries, contrary to the terms in the letter dated 24.09.2018. The Respondents cannot be permitted to resile from their own correspondence which is in the nature of extension of contract as neither has 3 (three) years elapsed from the date of extension of the contract being

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

12.10.2017 nor has the MHA, GOI notified amendments of the Lottery Rules. That creation of infrastructure for distributorship and marketing has involved substantial expenditure and the sudden announcement of inviting Tenders has seriously prejudiced the rights and interests of the Petitioners which is not only violative of Article 14, Article 19 (1)(g), Article 300 (A) and Articles 301 to 304 of the Constitution of India but also is completely contrary to the specific contract entered into between the parties hence the prayers in the instant petition and the I.A. be granted.

6. Mr. J.B. Pradhan, Additional Advocate General, making submissions for the Respondents No. 1 and 2 argued that admittedly the letter dated 27.10.2018 specified that the Petitioners were to continue distributorship of 8 (eight) weekly Online Lotteries as an "*interim arrangement*" till such time the appointment of a new Marketing Agent was finalized. The letter also specified that in the event of acceptance of the terms, a confirmation letter was to be sent by the Petitioners on or before 01.11.2018 (4 p.m.) failing which continuation of the distributorship would be terminated summarily. The Petitioners, vide response dated 30.10.2018 categorically accepted the terms by stating *inter alia* that they accept the offer of the Respondents for continuation of 8 (eight) Weekly Online Lotteries and accepted all terms and procedures mentioned in the communication thereby in categorical terms

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

accepted the *interim arrangement* as spelt out by the Respondent No. 2 till such time the appointment of a new Marketing Agent is finalized. This fact is also evident from the contents of the letter dated 12.11.2018 addressed to the Respondent No. 2 where the Petitioners have stated that they have given their acceptance for continuation of distributorship of draws with a request to review the same for continuation of distributorship in terms of the letter dated 24.09.2018. In light of such awareness and acceptance of terms of the Respondent No. 2, the Petitioners cannot now turn back and state that the decision of the Respondents was arbitrary or irrational or claim violation of their fundamental rights. That despite the Petitioners' awareness of Tenders being floated on 09.07.2018 and 17.07.2018, no protest was put forth by them at the relevant time or at any subsequent time thereto. The Respondent No. 2 was constrained to withdraw the said Tenders when certain contingencies arose and admittedly offered the Petitioners continuity of agency but this in no manner tantamounts to allowing the Petitioners to continue in perpetuity.

7. Learned Additional Advocate General would further canvass that nothing prevented the Petitioners from participating in the bids dated 09.07.2018 and 17.07.2018 when the Tenders were floated as admittedly they had purchased Tender Forms thereby indicating intention to

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

participate in the said bids. That, the Tenders have been floated in larger public interest as there cannot be a loss of public revenue and the distributorship cannot be granted by extension of agreement. Hence, in view of the facts and circumstances brought to the notice of this Court, it is apparent that the petition is a chance petition. Moreover as the Petitioners contend that the contract between the parties have been violated no remedy obtains to them under Article 226 of the Constitution. It is prayed that the petition deserves no consideration and be dismissed with exemplary costs.

8. I have heard at length and considered carefully the submissions put forth by the parties. Documents relied on by the Petitioners have been meticulously examined by me.

9. The genesis of this petition is an agreement dated 07.11.2012 whereby the Petitioners were appointed as Marketing Agent for distributing and marketing 8 (eight) Online Lottery Schemes for 5 (five) years till 06.11.2017. Prior to the expiry of the said agreement vide communication dated 12.10.2017, the Respondent No. 2 intimated to the Petitioners its decision to extend the distributorship of the Petitioners on grounds that the proposal to invite Expression of Interest for appointment of Marketing Agents/Distributors failed to fructify due to imposition of the code of conduct for Panchayat Election and the likelihood of amendment to the Lotteries (Regulation) Act, 2016 by the MHA, GOI. The extension vide

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

the said letter is clearly upto 06.02.2018. On 27.10.2018, the Respondents issued the impugned letter to the Petitioners stating that their distributorship was an *interim arrangement* till such time a new Marketing Agent was appointed and finalized. The Petitioners were required to submit their acceptance to the terms specified in the letter on or before 01.11.2018 (4 p.m.) failing which the distributorship would be terminated summarily. Apprehending such termination, the Petitioners vide their communication dated 30.10.2018 accepted the offer while at the same time requesting the Government to review their decision and continue their distributorship in terms of the letter of the Respondent No. 2 dated 24.09.2018. The Petitioners despite having accepted the terms as set out in the letter dated 27.10.2018 are now crying foul as the agreement between the Petitioners and the Respondents was subsisting when the impugned Tender was floated. It would be apposite at this stage to refer to the relevant portion of the letter of the Respondent No. 2 dated 27.10.2018. The correspondence states as follows;

"...Further, the State Government has also approved for continuation of distributorship of the 08 (Eight) weekly Online Lotteries per day at the revised rate of ₹52,000/- per draw and draw expenses of ₹3,000/- per draw, as an interim arrangement, till such time the appointment of a new Marketing Agent is finalized. ..."

In response thereto, it is admitted that the Petitioners accepted the terms, vide communication dated 30.10.2018 as follows;

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

"...Reference: Your Letter dated 24/10/2018(sic 27.10.2018) bearing Letter No:789/FIN/ DSSL/III/2018-19/359.

.....

 We here by confirm the acceptance all the terms & procedures mentioned in this communication. We request you to please issue us a letter for extension of 08 (Eight) online weekly lotteries on receipt of this acceptance letter. ..."

10. In my considered opinion it is understandably an open and shut case. Once the Petitioners have accepted the terms and conditions as specifically reflected in the correspondence dated 30.10.2018 are they in a position to now reprobate and state that it was due to apprehension of their distributorship being discontinued that they responded in the manner as stated above. The reply would obviously have to be in the negative. In ***Shyam Telelink Ltd. Vs. Union of India (UOI)***¹ the Hon'ble Supreme Court while deciding a matter under the Telecom Regulatory Authority of India Act, 1997 considered the question as to whether the Appellant was entitled to question the terms of the Migration Package after unconditionally accepting and acting upon the same and held as follows;

"...13. The unconditional acceptance of the terms of the package and the benefit which the appellant derived under the same will estop the appellant from challenging the recovery of the dues under the package or the process of its determination.

.....
 Allowing the appellant at this stage to question the demand raised under the Migration Package

¹ (2010) 10 SCC 165

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. ...”

11. In *City Montessori School v. State of Uttar Pradesh and Ors.*²

the Hon'ble Supreme Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. Thus when a person knowingly accepts the benefits of a contract he is estopped from denying the validity or binding effect on him of such contract. In the instant case, the Petitioners have accepted the terms and procedures mentioned in the impugned letter dated 27.10.2018 in categorical terms as extracted hereinabove. It is not the Petitioners case that the Expression of Interest was issued behind their back and caught them unawares, they were indeed seized of the fact of the Tender floated not only vide the impugned Expression of Interest

² (2009) 14 SCC 253

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

dated 29.10.2018 but also of the earlier Expressions of Interest dated 09.07.2018 and 17.07.2018. It is relevant to note at this point that vide letter dated 12.10.2017 the marketing and sale of 8 (eight) Online Lotteries to the Petitioners was in fact extended by 3 (three) months upto 06.02.2018. It was the specific argument of the Counsel for the Petitioners that there was no revocation of the extension letter dated 12.10.2017. On this count it is worth noticing that vide letter dated 12.10.2017 the extension for marketing lotteries was upto 06.02.2018. From 06.02.2018 upto 23.09.2018 as per documents relied on by the Petitioners before this Court evidently no communication ensued from the Respondent No. 2 extending the contract of the Petitioners from 06.02.2018 thereby indicating that the Petitioners were functioning in limbo without any renewal of contract from the said date. Strangely enough again on 24.09.2018 the Respondent No. 2 offered continuation of distributorship of 5 (five) out of the 8 (eight) Online Lotteries per day for 3 (three) years or till notification of the amended Lottery Rules by the MHA, GOI whichever is earlier. It is relevant to point out that this fact was not raised by the Respondents but is being highlighted herein to indicate the apparent carelessness in the functioning of the Department as also the tangential magnanimity meted out to the Petitioners. So far as revocation of the communication dated 24.09.2018 is concerned whereby the Petitioners were offered continuation

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

of distributorship, the contents of this letter is obviously overruled by the contents of the letter dated 27.10.2018 the terms of which were accepted unequivocally by the Petitioners.

12. While adverting to the communication dated 12.10.2018 the relevant portion of the contents is extracted hereinbelow for easy reference;

"...The State Government also reserves the right to discontinue this arrangement at any time without assigning any reason thereof. ..."

The categorical intention of the Respondent No. 2 has been spelt out in the correspondence and no protest rears its head from the Petitioners on this specific count.

13. Although it was vehemently argued by learned Counsel for the Petitioners that there was an existing contract between the Respondents and the Petitioners which therefore cannot be breached, in this context we may refer to the ratiocination in ***State of U.P. and Others v. Bridge & Roof Company (India) Ltd.***³ wherein the Hon'ble Supreme Court pronounced as follows;

"...16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for

³ (1996) 6 SCC 22

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the high Court under Article 226. Indeed, the High Court has not granted the said prayer.

.....
 18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. ...”

The ratio lucidly explains the legal position and requires no elucidation.

14. On the question of promissory estoppel raised by the Petitioners, the doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it. As earlier pointed out, the Government has set out unequivocally in its letter dated 12.10.2017 that it could discontinue the agreement at any time without assigning any reason. It is asserted that the Petitioners have been in the business since 2012 hence it can safely be assumed that logistics were in place and any

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

additional expenditure incurred subsequently cannot be termed as loss making or inequitable. What looms large of course is the fact of acceptance of conditions by the Petitioners as laid down by the Respondent No. 2 in the impugned letter dated 27.10.2018.

15. In view of the aforesaid facts and circumstances that have emerged and also bearing in mind the well-established principles of law governing the grant of stay, I am of the opinion that no case is made out for stay of the impugned letter dated 27.10.2018. No grounds also emanate for setting aside the letter dated 27.10.2018 and the invitation for Expression of Interest/Tender dated 29.10.2018 and in view of the acceptance of the terms and conditions set forth in the impugned letter dated 27.10.2018, the question of directing the Respondents to abide by the correspondence dated 24.09.2018 does not arise. While the contents of the letter dated 12.10.2017 extracted hereinabove empowers the Respondents to discontinue the arrangement at any time without assigning reasons, hence the Petitioners are not entitled to any of the reliefs claimed.

16. The petition hereby stands rejected and W.P. (C) No. 51 of 2018 is disposed of accordingly as also the I.A. No. 01 of 2018.

M/s Pan India Network Ltd. and Anr.
Vs. The State of Sikkim and Anr.

17. Certified copies be made available to the parties, as per Rules.

(Meenakshi Madan Rai)
Judge
29.11.2018

Approved for reporting: **Yes**
Internet: **Yes**

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